

**CONCURRING STATEMENT OF
COMMISSIONER MICHAEL J. COPPS**

Re: Carriage of Digital Television Broadcast Signals: Amendments to Part 76 of the Commission's Rules

In a few moments, I will vote to concur in this item. It was not an easy decision. I do so because the item has been significantly improved from what it was through the intense discussions of recent days. Still, the outcome falls far short of what might have been, the timing is out-of-sync with other important proceedings, and the process short-circuits the Commission's public interest responsibilities.

We are told to act now because this proceeding has been pending for so long. That's fine—if we have done our work. But we have not done our work. Other items integral to this one, prerequisites for today's vote, have been around even longer. Consider that in 1999, more than a year *before* our first must-carry vote, we opened a proceeding on the public interest obligations of digital TV broadcasters. And in that public interest proceeding, remember that we were not writing on a blank slate. Rather, we were addressing issues raised in a report from a Presidential advisory committee that was issued a full year before that. It is six years later now, and this Commission still has not provided the American people with a clear idea as to how broadcasters' enhanced digital spectrum is going to improve our viewing experience. The must-carry decision was a golden opportunity in which to consider this—but we let it slip away. Instead we have a record of inaction that will go down, I believe, as the Commission's major failing in its efforts to move the digital transition forward.

So I want to be clear that this Order is not of my making and its timing is not of my choosing. I have been abundantly clear throughout that we should address the public interest first. I have begged my colleagues to do this. I have begged my broadcaster friends to engage the issue. The digital transition holds the promise of reinventing free, over-the-air television by not only providing consumers new and valuable services, but offering broadcasters new and valuable business opportunities.

I am frustrated that broadcasters have been reluctant to engage in a dialogue on the public interest. It is particularly small and independent broadcasters who should be leading the discussion because they have so much to gain—or lose—via the wrong must-carry outcome. The networks and stations with real market leverage need not worry—they know they will have carriage through the pure power of their market negotiating muscle. I am concerned, however, about independent broadcasters, including those that seek to provide public affairs programming, religious programming, family-friendly programming, Spanish-language programming, or other programming to reach underserved parts of their communities. Independent broadcasters already face so many challenges in this consolidated environment, and I worry that this decision may impose very high opportunity costs on them. I am also concerned, I should add, that this decision may lead some broadcasters to use the public spectrum for ancillary pay services, rather than for free over-the-air broadcasts to their communities. That's not what the digital transition is supposed to be all about.

When we pause to consider what truly local stations could bring to the television experience by way of covering community developments, local news, district-level Congressional races, high school and local college sports and how they could feature and encourage local talent and local creativity, it becomes very clear very quickly that making good use of this spectrum is profoundly important to the people—you and me—who own it.

My disappointment goes beyond the broadcasters to the Commission itself, because it has short-circuited proceedings that cried out to be completed before we decided on the must-carry item. We are little more than half way through the grassroots localism hearings the Commission pledged to conduct so that we could better understand how to promote media diversity and localism. Isn't how broadcasters make use of the significant additional spectrum resources given to them integral to any worthy discussion of diversity and localism? But we'll complete localism later, I guess. Ready, fire, aim. Our snail's pace in handling public interest items that have been pending here for more than five years is, to me,

embarrassing. Today we manage to get some assurance that the public interest items will be called up soon and hopefully completed before the year is out—these are items pertaining to disclosing a station’s public file on the Internet and the even more important proceeding regarding the general responsibilities of television broadcasters in the digital era—something on which the Presidential advisory committee spent a lot of time and effort and also something which a host of public-spirited groups have been advocating for years. If we can move boldly forward on items concerning the mechanics of the digital transition—like we did on digital tuners, plug-and-play, the broadcast flag, signal replication and so on—then why, oh why, haven’t we been able to address what’s in the digital revolution for our consumers and citizens?

Time and again we have failed the American people and local broadcasters. On top of the localism and public interest proceedings I just mentioned was the majority’s decision in 2003 to drastically loosen media consolidation protections, thereby threatening the very survival of small local broadcasters who represent what is left of localism and diversity in the new big media environment. We also have failed to deal in a timely fashion with the NASA petition concerning local stations’ relationship to the networks. Now we fail again.

I believe that a properly-crafted must-carry decision would be a boon to localism, diversity and competition. Does that mean cable should have to carry every programming idea that any broadcaster can dream up? Of course not. I don’t believe cable should have the burden to carry every camera hanging out of a window or the home shopping programs or all those infomercials masquerading as real programs. Our challenge is to craft some balance here. But we never sought balance. We never had that public dialogue about how to incent truly local and diverse programming. Nor, indeed, did we attempt to understand the economic consequences that would flow from any of the various decisions we could have made about must-carry. What does it mean for broadcasting if there is no available audience for those huge swaths of spectrum opportunity that multicast affords? What does our decision mean in terms of who has what leverage in future carriage negotiations? What does this mean especially for small, independent stations who just may have the wherewithal and the desire to provide good multicast programming but who lack negotiating power to give it an audience? Where is the analysis here? Someone is going to pay for whatever decision we make—and, here as in so many other areas, it is the consumer who ends up footing the bill, monetary and otherwise.

Even where I agree with specific outcomes, I disagree with much of the analysis in this item. For example, I concur with the decision to deny dual carriage during the digital transition; I agree that a dual carriage mandate would be a burden that cable operators are not legally required to shoulder. But I believe our denial need not reach the Constitutional issues referenced in today’s item. I also believe there is ample latitude available to the Commission to determine changed carriage requirements in a changed media environment through both the broad language of the statute and also through court decisions admonishing us to seek diversity, a multiplicity of voices and a viable environment for free, over-the-air broadcasting. These fundamental objectives are at the heart of our communications statutes and they have been repeatedly referenced and upheld by courts across the land. By the way, I also wonder why, if there is such urgent need to decide must-carry today, the related question of what “program-related” means does not qualify for our decision-making at this time?

I urge cable operators and broadcasters to negotiate in good faith for cable carriage of local programming or other broadcast offerings that serve their communities. Maybe it’s the impossible dream, but the promising agreement that issued last week from discussions between cable and public television indicate that, dreams aside, it can be done. The agreement between cable operators and public television to guarantee cable subscribers access to digital public television programming breathes hope and life into digital television like nothing else we have seen. I commend the parties for their dedication to accomplishing this landmark agreement, I hope all operators will participate, and I hope we will all learn a lesson from it.

I also wish to emphasize, as the Order now does, that the decision we make today is based on the record presently before us. It is an incomplete record if for no other reason than important prior proceedings, upon which this one should have depended, are left unfinished. I look forward to a day

when the Commission will once again accept its responsibility and we can have a dialogue on localism, diversity and the public interest in the digital age that will yield consumer-friendly, and citizen-friendly, results, allowing us all to reap the expansive new opportunities that digital technology can produce.

The discussions of the past few days have been intense for all of us. I want to thank my colleagues for their hard work. All of them participated, but I want to single out Commissioner Adelstein particularly for the energy, commitment and creativity he has brought to our discussions. He has my deep and sincere gratitude. Thanks also to our hard-working personal staffs, who braved late hours and even sickness to work through this, and thanks to all those in the Bureau who worked so hard on this proceeding.